SUPREME COURT, U. S.

No. 167

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

ROY A. OAKLEY,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner presents his petition for a rehearing of this Court's Order, dated October 23, 1961, denying the petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and therefor respectfully prays for a rehearing thereof.

GROUNDS FOR REHEARING

The petition for Writ of Certiorari was denied without opinion. Petitioner herein feels that the jury did not comprehend adequately and properly the instructions of the Court nor the law applicable to the facts and evidence adduced at the trial in the Court below in the United States District Court for the Middle District of Tennessee. Further, from the verdict of the jury, considering the reasonably short length of time that the jury deliberated upon the case before returning its verdict on one indict-

ment, containing ten counts (one of which was dismissed on the motion of the Government) leaving nine separate counts for the jury's deliberation and consideration and a second indictment, containing one count, it appears that the jury did not understand the issues involved in this case, nor were they cognizant of the rights of the petitioner in this case afforded him under the law.

Further, it appears that the jury, in finding the defendant guilty on all counts of the indictment submitted to it by the Court herein, if not stampeded into an inarticulate general verdict of guilty, on all counts of the indictment, because the Government introduced into evidence unretouched nude photos showing an exposure of the genital area with respect to two counts of the indictment, then most surely the judgment of the jury was colored unreasonably and contrary to law, as to all other counts of the indictment, because of the introduction into evidence of unretouched nudes revealing the genital area; it is reasonable, we submit, to conclude that the trial of a case of this length, as was conducted in the trial court below, together with the myriad of exhibits introduced into evidence by the defense on behalf of the petitioner, that the jury did not and could not consider guilt or innocence of the petitioner as to each count of the indictment.

The petitioner was entitled, we submit, to be tried before a jury which by their verdict not only indicated and revealed that they understood the issues in the case, but also that the jury comprehended the law applicable to the issues herein, and applicable to each count of the indictment upon which petitioner was tried herein.

Point I

The petitioner submits that the first count of the ten count indictment upon which he was tried, and under which the Government introduced certain alleged advertising, as evidence, was in truth and in fact totally un-

related to all of the other counts in the indictment. Yet, the jury by its verdict makes it apparent that they did not understand this, notwithstanding the fact that they should so have comprehended this issue, so as to protect the rights of the defendant and afford him a fair trial. It is worthy of note that the petitioner had completely and utterly ceased and abandoned the use of the advertising material allegedly concerned in the first count of the ten count indictment at least, some eighteen months before he sent through the mails a single, unretouched nude photo, or any photographs unretouched, exposing the genital area. Hence, the alleged advertising material referred to in the first count of the ten count indictment did not and could not fairly or reasonably be related to anything contained in the other counts of the indictment or the single count indictment.

Consequently, the alleged advertising referred to in count one of the ten count indictment could hardly be concerned with the materials, including the unretouched nudes, concerned with any of the subsequent counts of the ten count indictment. Thus, the alleged advertising referred to on pages 4, 5, and 9 of the Government's brief in opposition to petitioner's Writ of Certiorari were hardly applicable to, or actually tied up with the unretouched nude photos showing the genital area. It seems that an articulate consideration and examination of the record, would reveal that the unretouched nude photos, including those showing the genital area, were not tied up with, nor concerned with advertising referred to in the first count of the ten count indictment nor with the advertising referred to on pages 4, 5, and 9 of the Government's brief in opposition to petitioner's Writ of Certiorari.

Point II

As suggested before, we urge that the jury in its deliberations of this case pursuant to the instructions of the Court, considering the law and facts and all of the evi-

dence, adduced at the trial of the case, particularly those numerous defense exhibits which were determined previously as a matter of law not to be obscene, and which were most surely applicable as a contemporary community standard in the community in which this jury resided, that the conclusion is inescapable that they did not understand the issues involved herein; and further, that they did not understand the law applicable to this case, notwithstanding their verdict. We respectfully submit that the trial Court below should have corrected this situation by granting a judgment for the defendant n.o.v. or a new trial in the light of and considering all of the circumstances surrounding the verdict of this jury on the two indictments involved herein, in which ten counts thereof were submitted to the jury for its determination.

The jury could not ignore the law applicable to this case which has long obtained, "that nudity per se is not obscene". Further, we respectfully submit that the jury could not ignore the law as applied by this court as to the determination of the standard of obscenity as set forth in the cases of *Sunshine Book Company* v. *Summerfield*, 355 U. S. 372 (1958) and *Roth* v. *United States*, 354 U. S. 476 (1957).

Point III

Petitioner respectfully submits that a fair appraisal of all of the counts of the indictments considered by the jury in its deliberations and all of the evidence and the exhibits introduced by the government in support of said counts of the indictment, could hardly result in a determination that they appealed to the prurient interest, as defined, set forth and intended in the terms of the *Roth* decision; nor could the jury have fairly and reasonably concluded and subsequently find that any of the material with which the petitioner was charged with disseminating in this case, conflicted, actually, with the contemporary community standards obtaining in this community.

Most surely, petitioner submits that the evidence adduced by the government against him and charged as an appeal to prurient interest was no different than that obtaining as a contemporary community standard in this area; and petitioner submits that the evidence adduced by the Government against him was in many instances, even less likely to appeal to prurient interest or to be declared as obscene and appealing to prurient interest, than that which obtained as a contemporary community standard wherein the petitioner lived and where the jury resided. The exhibits offered in evidence by the defendant (Petitioner here) which were purchased from newsstands and from art stores open to the general public in the immediate area wherein this case was tried, clearly support this contention and position of the petitioner. Consequently, we respectfully submit that the jury could not ignore, as they did here, the determination of the standard, setting forth the appeal to prurient interest as declared by this Court in the case of *Roth* v. *United States* 354, U. S. 476 (1957). Failing this, the petitioner was prejudiced, indeed, and accordingly the rights and protection which the law afforded unto him in this case were denied this petitioner.

CONCLUSION

It is respectfully urged that the petition for rehearing be granted and that, upon further consideration, a Writ of Certiorari issue to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

JOSIAH LYMAN
Attorney for Petitioner

CERTIFICATE OF COUNSEL

I, Josiah Lyman, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58 Subdivision 2, of the Rules of this Court.

JOSIAH LYMAN
Attorney for Petitioner